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DEPARTMENT OF JUSTICE

28 CFR Part 16

[CPCLO Order No. 004-2014]

Privacy Act of 1974; Implementation

AGENCY: Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: As described in the notice section of this issue of the Federal Register, the Department of Justice (Department or DOJ) has published a notice of a new Department-wide Privacy Act system of records, “Department of Justice, Giglio Information Files,” JUSTICE/DOJ-017. This system has been established to enable DOJ investigative agencies to collect and maintain records of potential impeachment information and to disclose such information to DOJ prosecuting offices in order to ensure that prosecutors receive sufficient information to meet their obligations under Giglio v. United States, 405 U.S. 150 (1972), as well as to enable DOJ prosecuting offices to maintain records of potential impeachment information obtained from DOJ investigative agencies, other federal agencies, and state and local agencies and to disclose such information in accordance with the Giglio decision. For the reasons provided below, the Department proposes to amend its Privacy Act regulations by establishing an exemption for records in

this system from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(j) and (k).

DATES: Comments must be received by [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESS: Address all comments to the Privacy Analyst, Office of Privacy and Civil Liberties, National Place Building, 1331 Pennsylvania Avenue NW., Suite 1000, Washington, DC 20530, or by facsimile to (202) 307-0693. To ensure proper handling, please reference the CPCLO Order Number on your correspondence. You may review an electronic version of the proposed rule at <http://www.regulations.gov>, and you may also comment by using that website's comment form for this regulation. Please include the CPCLO Order Number in the subject box.

Please note that the Department is requesting that electronic comments be submitted before midnight Eastern Time on the day the comment period closes because this is when <http://www.regulations.gov> terminates the public's ability to submit comments. Commenters in time zones other than Eastern Time may want to consider this so that their electronic comments are received. All comments sent via regular or express mail will be considered timely if postmarked on or before the day the comment period closes.

Posting of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov> and in the Department's public docket. Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase “PERSONALLY IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also place all the personally identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personally identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, will be posted online and placed in the Department’s public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency’s public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

FOR FURTHER INFORMATION CONTACT: Tricia Francis, Executive Office for United States Attorneys, FOIA/Privacy Act Staff, 600 E Street NW., Suite 7300,

Washington, DC 20530, or by facsimile at (202) 252-6047.

SUPPLEMENTARY INFORMATION:

In the notices section of this issue of the Federal Register, the Department of Justice has published a system of records notice for the system entitled, “Department of Justice Giglio Information Files,” JUSTICE/DOJ-017. This Department-wide system notice replaces the notice for the system entitled, “United States Attorney’s Office, Giglio Information Files,” JUSTICE/USA-018, 65 FR 75308 (Dec. 1, 2000). That system of records was exempt from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(j) and (k). Those exemptions are codified in the Code of Federal Regulations (CFR) section for Exemption of United States Attorneys Systems (28 CFR 16.81(g) and (h)). The Department is now proposing to establish a new CFR section for exemptions of the JUSTICE/DOJ-017 system (28 CFR 16.136) and to amend 28 CFR 16.81 by removing paragraphs (g) and (h). The Department intends that the exemptions previously established in 28 CFR 16.81(g) and (h) will continue to apply to the JUSTICE/USA-018 system and all its records until the effective date of 28 CFR 16.136.

Regulatory Flexibility Act

This proposed rule relates to individuals as opposed to small business entities. Pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, the proposed rule will not have a significant economic impact on a substantial number of small entities.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),

5 U.S.C. 801 et seq., requires the Department to comply with small entity requests for information and advice about compliance with statutes and regulations within the Department's jurisdiction. Any small entity that has a question regarding this document may contact the person listed in FOR FURTHER INFORMATION CONTACT. Persons can obtain further information regarding SBREFA on the Small Business Administration's website at <http://www.sba.gov/advocacy/825>.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), requires that the Department consider the impact of paperwork and other information-collection burdens imposed on the public. There are no current or new information-collection requirements associated with this proposed rule. The records that are contributed to this system would be created in any event by law enforcement entities, and their sharing of this information electronically will not increase the paperwork burden on these entities.

Analysis of Regulatory Impacts

This proposed rule is not a "significant regulatory action" within the meaning of Executive Order 12866 and therefore further regulatory evaluation is not necessary. This proposed rule will not have a significant economic impact on a substantial number of small entities because it applies only to information about individuals.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law No. 104-4, 109 Stat. 48, requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments and the private sector. UMRA requires a

written statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A “Federal mandate” is a new or additional enforceable duty imposed on any State, local, or tribal government or the private sector. If any Federal mandate causes those entities to spend, in aggregate, \$100 million or more in any one year, the UMRA analysis is required. This proposed rule would not impose Federal mandates on any State, local, or tribal government or the private sector.

List of subjects in 28 CFR Part 16:

Administrative Practices and Procedures, Courts, Freedom of Information Act, Government in the Sunshine Act, Privacy Act.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order No. 2940-2008 the DOJ proposes to amend 28 CFR part 16 as follows:

PART 16 --[AMENDED]

1. The authority citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Subpart E—Exemption of Records Systems Under the Privacy Act

§ 16.81--[AMENDED]

2. Amend § 16.81 by removing paragraphs (g) and (h).

§ 16.136--[ADDED]

3. Add § 16.136 to subpart E to read as follows:

§ 16.136 Exemption of the Department of Justice, Giglio Information Files,

JUSTICE/DOJ-017.

(a) The Department of Justice, Giglio Information Files (JUSTICE/DOJ-017) system of records is exempted from subsections (c)(3) and (4); (d)(1) through (4); (e)(1), (2), (3), (4)(G), (H), and (I), (5), and (8); (f); and (g) of the Privacy Act. These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j) and/or (k).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) of the Privacy Act because this subsection is inapplicable to the extent that an exemption is being claimed for subsection (d) of the Privacy Act.

(2) From subsection (c)(4) of the Privacy Act because this subsection is inapplicable to the extent that an exemption is being claimed for subsection (d) of the Privacy Act.

(3) From subsection (d) of the Privacy Act because access to the records contained in this system may interfere with or impede an ongoing investigation as it may be related to allegations against an agent or witness who is currently being investigated. Further, other records that are derivative of the subject's employing agency files may be accessed through the employing agency's files.

(4) From subsection (e)(1) of the Privacy Act because it may not be possible to determine in advance if potential impeachment records collected and maintained in order to sufficiently meet the Department's Giglio requirements and obligations are all relevant

and necessary. In order to ensure that the Department's prosecutors and investigative agencies receive sufficient information to meet their obligations under Giglio, it is appropriate to maintain potential impeachment information in accordance with Department policy as such records could later be relevant and necessary in a different case in which the same witness or affiant subsequently testifies.

(5) From subsection (e)(2) of the Privacy Act because collecting information directly from the subject individual could serve notice that the individual is the subject of investigation and because of the nature of the records in this system, which are used to impeach or demonstrate bias of a witness, requires that the information be collected from others.

(6) From subsection (e)(3) of the Privacy Act because federal law enforcement officers receive notice from their supervisors and prosecuting attorneys that impeachment information may be used at trial. Law enforcement officers are also given notice by the Giglio decision itself.

(7) From subsections (e)(4)(G), (H), and (I) of the Privacy Act because this system of records is exempt from the access and amendment provisions of subsection (d) of the Privacy Act.

(8) From subsection (e)(5) of the Privacy Act because it may not be possible to determine in advance if all potential impeachment records collected and maintained in order to sufficiently meet the Department's Giglio requirements and obligations are all accurate, relevant, timely, and complete at the time of collection. Although the Department has policies in place to verify the records, the records may be originated from

another agency, third party, or open source media and it may be impossible to ensure the accuracy, relevance, timeliness, and completeness of potential impeachment information maintained prior to and during the process of being verified.

(9) From subsection (e)(8) of the Privacy Act because the nature of the Giglio discovery process renders notice of compliance with the compulsory discovery process impractical.

(10) From subsections (f) and (g) of the Privacy Act because these subsections are inapplicable to the extent that the system is exempt from other specific subsections of the Privacy Act.

Dated: March 4, 2015.

Erika Brown Lee,
Chief Privacy and Civil Liberties Officer
United States Department of Justice

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